

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

VS.

CR. NO. 21-0297 JB

DEAN GROSS,

Defendant.

Transcript of Motion Proceedings before
The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
New Mexico, commencing on November 23, 2021.

For the Government: Ms. Holland Kastrin

For the Defendant: Mr. Buck Glanz

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1 THE COURT: All right. Good afternoon
2 everyone. I appreciate everyone making themselves
3 available to me this afternoon.

4 The Court will call United States of
5 America versus Dean Gross, Criminal Matter No.
6 21-CR-0297 JB.

7 If counsel will enter their appearances for
8 the Government.

9 MS. KASTRIN: Good afternoon, Your Honor.
10 Holland Kastrin on behalf of the United States.

11 THE COURT: Ms. Kastrin, good afternoon to
12 you.

13 And for the defendant.

14 MR. GLANZ: Good afternoon, Your Honor.
15 Buck Glanz on behalf of Mr. Gross, who is present and
16 in custody. And may I remove my mask?

17 THE COURT: You may. Good afternoon to
18 you, Mr. Glanz. Mr. Gross, good afternoon to you.

19 THE DEFENDANT: Hello, sir.

20 THE COURT: All right. We're here on the
21 Government's motion for a Lafler-Frye hearing. I'll
22 certainly hear what anybody wants to say on it, and
23 I'll probably do what y'all want me to do unless
24 there is a disagreement, and it looks like there may
25 be a disagreement on this. In the past, I have not

1 ordered the magistrate judges to do it, I just do it
2 myself. But if that's -- you know, if y'all think
3 that it would be better if the magistrate does it,
4 that's fine. I certainly can't participate in any
5 way in plea negotiations, and don't want to do
6 anything like that. So if y'all prefer the
7 magistrate to do it, then I'll make that order. But
8 if not, we'll just do it right here and get it done.
9 It's totally up to y'all.

10 But I'm inclined to grant the motion. I
11 understand Mr. Gross' arguments, but he seems like a
12 person that's -- you know, can make up his own mind,
13 and not going to be persuaded by anything. And I'm
14 not going to -- if he wants to try his case, he's got
15 the right judge -- I love to try cases -- so we'll
16 get after it. But that's my thoughts.

17 Ms. Kastrin, if you wish to speak in
18 support of your motion.

19 MS. KASTRIN: Yes, Your Honor. First, I'd
20 like to note that the United States does not oppose
21 the Court taking the Lafler-Frye hearing. The only
22 reason that we frame our motion the way that we do is
23 to protect against the very thing that defense
24 counsel is complaining that he thinks we're trying to
25 do, which is trying to influence plea negotiations.

1 It is asking that it be before a magistrate judge.
2 That is our way of overtly showing that we're not
3 trying to do that. Nonetheless, we believe that we
4 can just make our offer a sealed exhibit to a hearing
5 before this Court. The Court never sees it, but it
6 protects the record, which goes to the second point
7 here, which is the reason the United States asks for
8 these hearings is not for any of these sinister
9 reasons that are raised in the response. It is for
10 the sole reason of protecting the integrity of a
11 conviction that we believe we are going to secure in
12 this case with a clear and unambiguous record.

13 The fact of Lafler and the fact of Frye
14 show that there are instances where convictions get
15 turned over because of defects with the communication
16 of a plea offer. And we're not accusing Mr. Glanz of
17 having that defect. But an empty record against such
18 a claim after the fact is not as good as a clear and
19 unambiguous record showing not only that he received
20 the offer that was made, but that we can show the
21 exact offer. So he can't claim later: Oh, I got a
22 plea offer, but not that offer. If I had known it
23 was that offer, I would have taken it.

24 So all we're trying to do is protect the
25 integrity of the conviction. We're not trying to

1 induce a plea by this defendant. But we believe it's
2 especially important here, when you look at the
3 record that, at an earlier stage, and for an offer
4 that no longer exists, that he initially accepted an
5 offer from the United States, then he absconded, then
6 that offer was revoked. And now he is looking at the
7 chance of additional charges.

8 And so with that, the specter of that
9 leading into a trial, we think it is especially
10 important to make sure the record is clear that he is
11 knowingly and voluntarily proceeding to trial.

12 THE COURT: All right. Thank you, Ms.
13 Kastrin.

14 Mr. Glanz, if you wish to speak in
15 opposition to the motion, you may do so at this time.

16 MR. GLANZ: Yes, Your Honor. Thank you.

17 As an initial matter, Your Honor, I did not
18 by any means mean to cast any nefarious intent to the
19 Government. In fact, Mr. White, who is the assigned
20 U.S. Attorney on this case, has been very reasonable
21 throughout this process. I like to think we have a
22 very open line of communication between the two of
23 us.

24 That being said, there is always the
25 possibility that my client could later assert that he

1 did not understand the plea offer and claim
2 ineffective assistance against me. And that could be
3 a potential constitutional right he wishes to assert,
4 I did feel as a matter of course to oppose the
5 hearing. I do understand that they are common in
6 this district, and occur with frequency in nearly
7 every case where a defendant intends to proceeds to
8 trial. I just want to state my opposition. And if
9 Your Honor does wish to have the hearing today,
10 assuming Your Honor does grant the Government's
11 motion, I have no opposition to Your Honor having
12 that happen right now.

13 THE COURT: All right. Thank you, Mr.
14 Glanz.

15 How about you, Ms. Kastrin?

16 MS. KASTRIN: I just want to add that there
17 is no constitutional right to preserving or
18 perfecting a claim of ineffective assistance in
19 advance of a trial. So for that reason, we would
20 especially would like a Lafler-Frye hearing here.

21 THE COURT: Well, I think it's always good
22 to try to reduce error and try to have clarity as
23 much as possible. When Lafler-Frye came out that
24 year, when it came out, I had been an advocate that
25 the local rule committee, the criminal local rules

1 require that every plea agreement be filed. I think
2 that was one of the suggestions, I believe it was
3 Justice Kennedy, had for dealing with this. Another
4 is the colloquy. And now we're seeing a little bit
5 of both. But I think they're good. I mean, this is
6 a very important decision for Mr. Gross, whether to
7 either take a plea or to go to trial.

8 These are big decisions for anybody. And
9 so to pause for a second and just make sure that
10 we -- everybody is on the same track and ready to go,
11 I think it's a good thing.

12 Do you care -- if Mr. Glanz doesn't care,
13 do you care as to whether a magistrate does it or I
14 do it?

15 MS. KASTRIN: I do not care. I think, as a
16 matter of judicial economy at this point, it would
17 make sense to move forward with it today, if the
18 Court is willing to.

19 THE COURT: Okay. I'm looking for the --
20 here it is.

21 All right. So I'll use, roughly, the
22 colloquy that the Government put attached to his
23 brief.

24 But let me talk a little bit to you, Mr.
25 Gross, about my role. I don't -- whether this is a

1 criminal case or a civil case, I do not get involved
2 in settlement at all. That's -- I make a real bright
3 line rule, not just in criminal cases where you have
4 to, but I even do it in civil. So I don't get
5 involved in that at all. And I'm not going to get
6 involved with it here. That's not proper or ethical
7 for a person that's going to try your case to be
8 involved in plea negotiations. So I have zero stake
9 in this. If you want to go to trial, we'll get ready
10 and go to trial. And if you want to take a plea,
11 that's your business. My role here today is a very
12 simple one; it's just simply to make sure you
13 understand what has occurred, make sure there is no
14 miscommunications. And Mr. Glanz is right, to try to
15 eliminate probably some habeas corpus or 2255 down
16 the road for anybody to say that he was ineffective.
17 So I think it protects everybody. But the most
18 important thing is it makes sure that you know at
19 this stage what's gone on -- and I'm sure you do --
20 but make sure that you know. And then, if you decide
21 to turn down the offer, then we'll talk here in a
22 moment about a pretrial conference, in fact, to get
23 us ready.

24 So I've been informed that the Government
25 extended a plea offer to Mr. Glanz on October 18,

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1 2021, which you rejected, after Mr. Glanz conveyed it
2 to you, on October 26, 2021. Is that right? Do you
3 understand that to have been the sequence of events?

4 THE DEFENDANT: Yeah, something like that.

5 THE COURT: Is there anything about that
6 that you don't think is true?

7 THE DEFENDANT: Well, Your Honor, may I
8 speak?

9 THE COURT: You may. If it's all right
10 with Mr. Glanz. I want to protect your
11 constitutional rights and not have you get in
12 trouble.

13 MR. GLANZ: And it is against my advice of
14 counsel. I do believe he wishes to address the Court
15 on matters unrelated to the hearing today.

16 THE COURT: Okay. Well, maybe if it's --
17 well, we'll see. We'll see. Maybe we can figure out
18 the topic. But as far as those sequence of events,
19 you know the Government made you an offer to
20 Mr. Glanz. They didn't make it directly to you, they
21 made it through Mr. Glanz. And my understanding is
22 you've rejected the offer. Is that correct?

23 THE DEFENDANT: Yeah. Can I tell you the
24 reason why?

25 THE COURT: It's not necessary. You don't

1 need to tell me.

2 THE DEFENDANT: I don't need to, but
3 some --

4 THE COURT: Why don't you follow
5 Mr. Glanz's advice. If he doesn't think it's a good
6 idea, then why don't you not tell me, okay? All
7 right. I want you to just follow his advice on this,
8 okay?

9 But you know that the Government extended
10 you a plea offer and you've rejected it; correct?

11 THE DEFENDANT: Yeah.

12 THE COURT: Okay. Now, again, I'm not
13 involved in any plea negotiations, and so I'm not
14 stating any opinion regarding your decision to plead
15 guilty, or proceed to trial, or plead not guilty and
16 settle. I simply need a yes or a no to the following
17 question, and I'll ask Mr. Glanz first: Mr. Glanz,
18 did you receive a plea offer for Mr. Gross from the
19 United States on October 18, 2021?

20 MR. GLANZ: Yes, Your Honor, I did.

21 THE COURT: And did you communicate the
22 terms of this plea offer to Mr. Gross on October 26,
23 2021?

24 MR. GLANZ: I did, and on subsequent
25 occasions as well.

1 THE COURT: All right. And Mr. Gross,
2 these questions are for you: Did you discuss with
3 your attorney, Mr. Glanz, the plea offer extended by
4 the Government to resolve your case?

5 THE DEFENDANT: Yeah. It was something
6 like that, yeah.

7 THE COURT: And are you satisfied that
8 before rejecting the plea offer or failing to accept
9 it before it expired, you had a full and complete
10 opportunity to discuss the plea offer with Mr. Glanz,
11 your attorney?

12 THE DEFENDANT: Was I satisfied? No.

13 THE COURT: Are you satisfied that you had
14 an opportunity to discuss it with Mr. Glanz as your
15 attorney?

16 THE DEFENDANT: No.

17 THE COURT: Okay. Do you think you need
18 more time before you reject the offer?

19 THE DEFENDANT: Well, I'm -- I'm not
20 understanding. What is -- this Court -- I'm like I'm
21 afraid to say anything just because of what you just
22 said right now. The Government offered the plea to
23 him. And when he told me about it, I asked him: So
24 they're threatening me. If I don't take the plea,
25 they're going to give me more charges. They were

1 threatening me. And that's why I wasn't happy about
2 taking the plea, you know what I mean, because they
3 were forcing me into taking it. So I'm, like,
4 confused. It's -- you guys ask us -- or you, Your
5 Honor, you asked me when I'm up on the stand and they
6 ask: Were you promised or did anybody force you into
7 taking this plea, I'm going to say right now: Yes, I
8 was forced into taking the plea, you know. So I'm
9 like -- I'm not happy with that, no, I'm not.

10 THE COURT: Okay. Well, remember the
11 question isn't whether you're happy or not, because I
12 know this is a tough time for you. I do.

13 THE DEFENDANT: Yeah.

14 THE COURT: I mean, I sit here with men
15 like you all the time, and they've got to make hard
16 decisions. And I really feel for you. This is a
17 hard thing.

18 THE DEFENDANT: Yeah, I'm not happy with
19 it.

20 THE COURT: But remember I'm not asking you
21 whether you're happy with it. I'm simply asking you:
22 Have you had a full opportunity to talk to Mr. Glanz
23 about the plea offer before you rejected it?

24 THE DEFENDANT: We spoke about it, but I
25 haven't had enough time. It was just dropped on my

1 lap, and said: If you don't take it by this time,
2 we're going to charge you with more charges, and
3 that's it, you know what I mean? And I'm like, whoa,
4 hold on, don't I get a say-so in this, you know what
5 I mean? And I'm -- look at me, I'm in shackles; I've
6 been in shackles since 3:00 this morning, you know.
7 And as far as I know, by the Eighth Amendment it
8 says, The bail shall not be required nor excessive
9 fines imposed or cruel and unusual punishment
10 inflicted on me. And I'm being cruel and unusual
11 punishment, and I haven't been convicted of anything,
12 you know what I mean? It's hearsay. I've got paper
13 right here in front of me that's telling me otherwise
14 that I did, in fact --

15 (Counsel conferred with defendant.)

16 THE DEFENDANT: See, that's where I just --
17 that's why I need a new lawyer, because this is why
18 we're here. We're in front of the judge, you know, I
19 need help showing him a simple thing like this.
20 Look, it says at the moment --

21 MR. GLANZ: Your Honor, Mr. Gross is just
22 wishing to go into the factual scenario right now,
23 and I have explained to him that that's what we're
24 going to do at the trial. I'm advising him not to at
25 this time.

1 THE COURT: Okay. I sure would follow his
2 advice, Mr. Gross, because you don't want to sit here
3 in front of the Government talking about the facts of
4 your case, because they might use that against you
5 down the road.

6 MS. KASTRIN: And, Your Honor, just to
7 avoid any claim of waiver, it is the United States'
8 position that no Eighth Amendment claim or excessive
9 bail or pretrial release would be relevant at a
10 trial, so we would oppose that being raised at a
11 trial, because that has nothing do with what a jury
12 as a fact finder would need to consider.

13 (Defendant conferred with counsel.)

14 THE COURT: Yeah, that's probably true.
15 But I think he's about to maybe want to talk about
16 the facts of the case. Right, Mr. Glanz, that's what
17 he's wanting to do?

18 MR. GLANZ: Yes, Your Honor, that's
19 correct. And I apologize if the Government was
20 confused about that. But no, he's attempting to read
21 from the discovery right now.

22 MS. KASTRIN: Okay, thank you.

23 THE COURT: Well, what do you suggest? Do
24 you have any thoughts as to where to go from here,
25 Ms. Kastrin?

1 MS. KASTRIN: I mean, I would ask for
2 further colloquy. I would note a couple of things in
3 the colloquy. The United States' position is a
4 defendant doesn't have a right to a plea offer in the
5 first instance. So the fact that he is unhappy with
6 the plea offer that the United States gave him or the
7 deadline that they gave him is of no constitutional
8 magnitude, since we didn't have to give him an offer
9 in the first instance.

10 We did give him an offer, and that is what
11 I would like for him to just -- if he has seen this,
12 and if I can hand him this exhibit and ask him to
13 read it and acknowledge that this is the offer he
14 received and that he's rejecting, I believe that will
15 be a sufficient record for us.

16 THE COURT: Go ahead and walk over there,
17 and let him look at it, and see if --

18 MS. KASTRIN: I'd further note in response
19 to some of the claims that he has made, that part of
20 the offer -- you know, and it is no longer an
21 existing offer at this point -- but part of it --

22 THE COURT: So the chance to accept it has
23 expired?

24 MS. KASTRIN: Correct. Yes, as part of the
25 terms -- and I am raising this because he did -- the

1 United States has indicated -- and I said beforehand
2 that there is the possibility of additional greater
3 charges. That is standard. Charge bargaining is a
4 standard form of plea negotiations that has been
5 recognized and approved not only in the Tenth
6 Circuit, but by the Supreme Court. It is part of the
7 how we keep the wheels of justice moving with the
8 number of cases that move through it.

9 The fact that that puts him in a bind of a
10 difficult decision, that's a result of his own
11 decisions to commit more than one crime and give us
12 the option to bring more than one charge. That's not
13 our fault; that's his own decision making that placed
14 him there.

15 But if he will read this exhibit,
16 acknowledge that he has read this exhibit; that this
17 is the offer he received, and that he has rejected
18 it, we believe that we have a sufficient record for
19 purposes of Lafler-Frye.

20 MR. GLANZ: And, Your Honor, so there is
21 one issue with this. It's the way Mr. Gross
22 perceived this offer, which I do believe was
23 accurate. I believe Mr. White and I were in
24 agreement that, with the two-point acceptance of
25 responsibility, his guideline range would have been

1 zero to six months. He's served approximately three
2 months already. In my experience, at this moment
3 it's taking about three months for a presentence
4 report to be generated. So he was under the
5 impression that, by the time that came about and made
6 the sentencing would be nearly the equivalent of a
7 credit time served sentence. So, in reviewing this,
8 he says that's not what it appears, but that was his
9 understanding, because that's functionally how it
10 would have been. So that's his only issue in looking
11 at this, because that was not the language of this
12 sealed exhibit. But nonetheless, he has reviewed the
13 terms and we did discuss it.

14 THE COURT: All right. Have you had a
15 chance now to review that plea offer, Mr. Gross?

16 THE DEFENDANT: Yes, sir. But that being
17 said, she just said that my chance of signing the
18 plea was over; right?

19 THE COURT: That's true.

20 THE DEFENDANT: So that's unfair.

21 THE COURT: But maybe I'm misunderstanding.
22 Is that the same plea agreement you reviewed earlier?

23 THE DEFENDANT: No.

24 THE COURT: Okay. And is that your
25 understanding, Mr. Glanz, as well that that's not the

1 plea agreement that he received earlier?

2 MR. GLANZ: No, Your Honor. As Your Honor
3 can understand, this is the exact offer that Mr.
4 White sent to me. But often, one of the skills that
5 is perhaps the most difficult of an indigent criminal
6 defense attorney is to attempt to always explain
7 things in the language and vernacular that a person
8 can understand. And as I said, functionally, it
9 would have amounted to a credit time served plea,
10 with the current timeframes that we're looking at.
11 So I think that's the disagreement.

12 THE COURT: It's just not written into the
13 plea agreement.

14 MR. GLANZ: It's not written that they
15 agree to a credit time served sentence.

16 THE DEFENDANT: So that's not fair.
17 (Defendant conferred with counsel.)

18 MS. KASTRIN: Your Honor, I would propose
19 that you ask the defendant, reading it today, does he
20 reject this plea offer, with all of this
21 understanding.

22 THE COURT: All right. I think it's a fair
23 question, Mr. Gross. You've read the plea agreement
24 today; correct?

25 THE DEFENDANT: Just right now, yes, sir.

1 THE COURT: And do you reject that plea
2 agreement?

3 THE DEFENDANT: Well, I didn't -- Your
4 Honor, I didn't read it. He took it away from me
5 before I got to read it. But let me look at it.

6 (Defendant conferred with counsel.)

7 THE DEFENDANT: Yeah, I read it.

8 THE COURT: And do you reject it?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you think that's clear
11 enough for your purposes?

12 MS. KASTRIN: I'd simply like to add to the
13 record that the thing that he just acknowledged that
14 he read, and the thing that he just acknowledged in
15 open court that he rejected, is a document that I
16 will be making a sealed exhibit to the minutes of
17 this, that is labeled "Sealed Exhibit to the
18 Minutes." I would just ask that, given some of the
19 difficulty of this exchange, that you ask him to
20 assert that he feels like he had enough time to
21 review and understand it, with the recognition that
22 this is, in fact, the same plea offer that was
23 extended two months ago. But I would just ask for
24 that one additional question about his ability --
25 that he felt like he had enough time and he was able

1 to confer with counsel.

2 THE COURT: Do you feel like you had enough
3 time to decide to reject the plea agreement?

4 THE DEFENDANT: No, sir, I don't. But that
5 was not what I was read two or three months ago, like
6 she's saying. That -- he just admitted that that is
7 not what he told me; that he put it in his own words.
8 So this is the first time I actually got to see it
9 with my own eyes. And that is not -- I have not had
10 enough time. But --

11 MS. KASTRIN: So I would ask how much
12 additional time does the defendant feel that he
13 needs -- because we certainly don't want to proceed
14 with this record -- how much additional time he
15 believes he needs to assess this, and that with the
16 recognition that we have a trial date currently of
17 December 22nd. And our willingness to even
18 contemplate seeking approval to maintain this plea
19 offer is going to be contingent on his willingness to
20 extend his trial date.

21 THE DEFENDANT: No.

22 (The defendant conferred with counsel.)

23 THE COURT: So, I mean -- I can let y'all
24 talk in here for a little bit. I'm sure Ms. Kastarin
25 would let you talk in here. Do y'all want to spend a

1 little time together, and then y'all tell me when
2 you're ready? I brought some work, so I can work on
3 an opinion that I'm working on for another criminal
4 case.

5 MR. GLANZ: And, Your Honor, again, I think
6 part of the problem here is this is a bit of a unique
7 case, particularly with the small amount of time that
8 he was facing under that.

9 And just to clarify, there never was a
10 written plea agreement. I think that's part of the
11 confusion Mr. Gross is having. As the Government's
12 motion does state, Mr. White did communicate that
13 offer to me orally, and I did communicate with my
14 client, explaining it to him in terms he could
15 understand. He did understand what I explained to
16 him.

17 I do believe the disagreement he has right
18 now is that he didn't read this exact language, which
19 is in the terms of how he would put it for a formal
20 record.

21 And do I think, after speaking to him just
22 now, he does still want to proceed to trial, and I
23 think he's ready to continue with the colloquy.

24 THE COURT: Okay.

25 (Defendant conferred with counsel.)

1 THE COURT: Okay. So do you feel like --

2 MS. KASTRIN: Well, Your Honor, we would
3 need the defendant to say that he feels he's had
4 enough time, and had adequate advice of counsel, for
5 this actually to have met the requirements for which
6 we're here, is to ensure that it is a knowing and
7 voluntary decision.

8 And I'd happily step out of the courtroom
9 if that would facilitate the discussions.

10 THE COURT: Well, let's see what
11 Mr. Glanz -- I mean, Mr. Gross says. Do you feel
12 like you've had enough time to decide whether to
13 reject the plea agreement?

14 THE DEFENDANT: Yes. Yes, sir --

15 THE COURT: And you've had an
16 opportunity --

17 THE DEFENDANT: -- I don't want that.

18 THE COURT: Okay. And you've had a full
19 opportunity to talk to Mr. Glanz, and you're ready to
20 make a decision? You feel like you've had enough
21 time to decide to reject it?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. Do you think that's
24 good enough for the colloquy?

25 MS. KASTRIN: And just, again, when he's

1 saying "it," it is the same terms that are in that
2 exhibit. With that, I believe that would be
3 sufficient.

4 THE COURT: We're talking about this piece
5 of paper that I'm never going to see, and it's going
6 to be put under seal and attached to the minutes.
7 That's what you're talking about when we talk about
8 rejecting it; is that right, Mr. Gross?

9 THE DEFENDANT: Let me read the back of it.

10 THE COURT: Okay.

11 MR. GLANZ: I'm sorry. Go ahead.

12 THE COURT: When I say I'll never see it, I
13 mean, I guess down the road, after a trial, and you
14 know, I could see it as a habeas, but I'm not going
15 to see it during this criminal proceeding.

16 Do you feel like you've had enough time to
17 talk to Mr. Glanz and make a decision, Mr. Gross?

18 THE DEFENDANT: Sure.

19 THE COURT: All right. So that document
20 right there in front of you, the white piece of
21 paper, that is the plea agreement. And you're ready
22 to reject it?

23 THE DEFENDANT: Can I ask one question,
24 sir?

25 (Defendant conferred with counsel.)

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Okay. Do you think that's
3 adequate then?

4 MS. KASTRIN: Yes, Your Honor.

5 THE COURT: All right. So we'll retrieve
6 that piece of paper. I'll ask Mr. Gonzales to seal
7 it into his Court's minutes.

8 Anything else on that motion, Ms. Kastrin?

9 MS. KASTRIN: Not on that motion.

10 But I would like to raise the current trial
11 date, because, as I noted, the United States expects
12 seeking a superseding indictment that will add a
13 charge. It is our understanding that defense
14 counsel, should we succeed in doing that, is going to
15 seek severance. We believe that attempting to get
16 that, since we have to wait for the timing of grand
17 juries, and then proceeding to a motion, a response,
18 and a reply, that that will not be concluded by the
19 present trial date of December 22. So we want --

20 THE COURT: What is the severance? He's
21 the sole defendant in this case; right?

22 MS. KASTRIN: Correct. I think --

23 THE COURT: So he wants to sever --

24 MS. KASTRIN: The charges. I think he will
25 seek to sever the two charges that the United States

1 anticipates being in the superseding indictment.

2 THE COURT: And what are those charges?

3 MS. KASTRIN: It would be escape, as well
4 as the current charge of false statement. And so --
5 and defense counsel -- I don't want to speak for him,
6 but this is my understanding from Mr. White -- has
7 expressed that he will be doing that. And so just to
8 the extent that we can raise that issue, and the
9 likelihood that that could not be resolved in advance
10 of a trial date, if it's possible to discuss the
11 trial setting and motions deadlines and things like
12 that, we would ask to do that at this time.

13 THE COURT: How do you feel, Mr. Glanz,
14 about the current trial date? Is this something you
15 want to keep? Move? What would you like?

16 MR. GLANZ: And my preference, Your Honor,
17 for a number of reasons, is to continue with the
18 trial date. Again, I've only --

19 THE COURT: When you say "continue," keep
20 it on?

21 MR. GLANZ: Keep it as it is on the 22nd.

22 THE COURT: All right.

23 MR. GLANZ: I can't speak for the number of
24 witnesses that the Government may call. But having
25 reviewed the discovery, it does not seem as though it

1 would be a lengthy trial. I think at most there is
2 five people named in the discovery that could
3 potentially be witnesses from their side. And the
4 allegations in this case span an interaction of
5 approximately 20 or 30 minutes. So it doesn't seem
6 as though it would be something that would take days
7 of the Court's time or anything like that. So our
8 preference would be to keep the existing trial date.

9 I have not seen a superseding indictment
10 yet. Mr. White has communicated to me that he
11 intends to seek one. And I did communicate back to
12 him that I would seek to sever that charge. It
13 covers different days, different facts, different
14 witnesses. And I did tell Mr. White I do believe
15 bringing it in the same matter would prejudice Mr.
16 Gross, particularly since the jury would learn about
17 him potentially escaping from the halfway house. And
18 I do think that would be prejudicial. And I will
19 raise that in writing once I see a superseding
20 indictment.

21 MS. KASTRIN: So the issue that the United
22 States has is not with how long the trial will take
23 or the witnesses. It's the fact of how long briefing
24 and resolution will take. And that will need to be
25 resolved prior to trial for us to even know how many

1 charges we're proving.

2 I would note that under Rule A, if charges
3 are related -- and in this case he could only escape
4 if he was in custody, and he was only in custody
5 because of his false statement. So they are
6 intertwined. And we believe they are properly joined
7 in a single indictment because one requires proof of
8 the other.

9 But I also don't want to prejudice the
10 United States and Mr. White in allowing for the
11 amount of time for full briefing on this issue. And
12 given that we cannot just bring charges unless he'll
13 agree to us doing it by an information. We don't get
14 to time when or whether we can get the superseding
15 indictment in place. And if that will be the
16 triggering event for a motion, then we've got 28 days
17 after that for briefing. I just don't view it as
18 possible to get that motion resolved and proceed to
19 trial knowing what witnesses we're going to need to
20 bring on the 22nd.

21 THE COURT: Well, I'll leave the trial in
22 place. It may be that once you get a new indictment,
23 you may look at it differently, given you're going to
24 try to sever and stuff. Because I don't want to
25 prejudice severance. But of course, by this point in

1 my career, I've had a lot of severance motions, and
2 they're a little bit tough if there is a factual
3 basis that links the two. But I'll keep an open mind
4 on that. But you might keep that in mind that you've
5 probably got a difficult motion, given what I've just
6 heard and what I understand about this case. And
7 plus, you may be looking at having to expedite some
8 briefing or something like that to try to get it
9 done. But I'll leave it in place. If that's what
10 Mr. Gross wants to do is keep it in place, we'll keep
11 in it place, and we'll just plan on a trial. But you
12 probably ought to plan also on the trial that is pled
13 in the indictment, even the superseding indictment.
14 Because those are tough motions to win, given the
15 case law as I know it.

16 All right. Is there anything else we need
17 to discuss while we're together? Anything else I can
18 do for you, Ms. Kastrin?

19 MS. KASTRIN: Not from the United States.
20 Thank you.

21 THE COURT: How about you, Mr. Glanz?

22 MR. GLANZ: No, Your Honor. And thank you
23 for setting this hearing so quickly.

24 THE COURT: Is there anything that Mr.
25 Gross is wanting to say that -- you know, I don't

1 want to prejudice him in any way, but I also want to
2 be a good judge for him. Is there anything he can
3 safely say?

4 (Defendant conferred with counsel.)

5 THE DEFENDANT: Your Honor, one more thing.
6 Is there any way for a pretrial or like a new bond or
7 some type of bond or something for me to -- I'm sick.
8 I've got burned really bad. I'm not getting the
9 right medical help over at the marshals, where I'm
10 housed now. And can you help me with this?

11 THE COURT: Well, let's do two things, Mr.
12 Gross. You do remind me we probably need to set a
13 pretrial conference. So given that we're barreling
14 toward trial on the 22nd, do you want to propose a
15 date, Ms. Kastrin, for a pretrial conference? And
16 I'll see if it works for Mr. Glanz. Then I'll
17 address more specifically your question, Mr. Gross.
18 But you reminded me that we do need to get together
19 before we have a trial.

20 MS. KASTRIN: I don't know if December 13
21 would work. Again, it's a little difficult without
22 knowing what will be filed, and if it will be fully
23 briefed, in setting a pretrial conference, and what
24 the Court would want to resolve there.

25 THE COURT: I am going to be traveling on

1 the 13th. Let's look at the 14th. I know I've got
2 to go down to Las Cruces during that period of time.
3 Do we have some time on the 14th for a pretrial
4 conference?

5 THE CLERK: Do you know when you're going
6 to Cruces, Your Honor? Is it the 15th?

7 THE COURT: Yes. I think I've got that
8 sentencing at 3:00 in the afternoon. Is that what's
9 appearing? That is for Mr. DeLeon.

10 THE CLERK: In Las Cruces? I'm sorry, Your
11 Honor?

12 THE COURT: Yes.

13 THE CLERK: I don't see it at 3:00. I
14 think it is at 1:30 on the 15th, Your Honor.

15 THE COURT: In Las Cruces?

16 THE CLERK: That's correct, Your Honor.

17 THE COURT: Okay. Do we have time for a
18 pretrial conference on the 14th?

19 THE CLERK: It would have to be
20 mid-morning, Your Honor, 10:00 or 10:30.

21 THE COURT: What if we did it at 10:30? A
22 couple hours would be okay. Why don't we set it at
23 10:00. That will give us plenty of time. Is that a
24 sentencing at 8:30, is that what that is?

25 THE CLERK: There is a sentencing at 9:00.

1 THE COURT: Do you want to do it 10:00 or
2 10:30?

3 MS. KASTRIN: I'd ask the Court to set it,
4 and if it turns out that Mr. White, it doesn't work,
5 or gets kind of superseded by later events and
6 filings, that we can ask to move it at that point.

7 THE COURT: I've got a sentencing at 9:00.
8 Do you want to set this pretrial for 10:00 or 10:30?

9 MS. KASTRIN: Assuming it works for
10 Mr. Glanz, I would recommend that we set it at 10:00.

11 THE COURT: Does that work for you,
12 Mr. Glanz?

13 MR. GLANZ: Yes, Your Honor.

14 THE COURT: All right. So we'll set the
15 pretrial conference at 10:00 on the 14th. Since I'm
16 going to be here for Christmas, I'm going to go see
17 grandkids that weekend. So I'll be driving back from
18 Dallas. That's the reason that I'm going to be
19 traveling on the 13th. Otherwise, I'd try to
20 accommodate you.

21 I am not prepared to do -- I guess what
22 you're kind of talking about is an appeal of the
23 detention hearing. I assume that a magistrate judge
24 said you've got to be detained pending trial; right?
25 That's kind of why you're here in custody, rather

1 than out on conditions? So to appeal that, I'd have
2 to look at some stuff; look at the bail report and
3 things like that. So we can't do it today. You talk
4 to Mr. Glanz. And then, if y'all feel like you need
5 to file a motion, we'll set up a detention hearing
6 and review why you're in custody. But I don't think
7 anything about you really, I don't know much about
8 you. So I'd have to look at bond reports and things
9 like that.

10 If I had to guess, you absconding earlier
11 is the kind of thing that a magistrate is not going
12 to let you out. I won't prejudge it, if you decide
13 to come back, but it's probably going to be an uphill
14 battle, given that you've already got one absconding
15 in this thing. Because, you know, they don't have to
16 prove much to show you're a flight risk. But
17 absconding kind of makes their case for them. So
18 chances are you're going to have to stay in custody
19 till trial. But the courthouse is always open. If
20 you feel like you've got a case for getting out, you
21 know, the courthouse is always open. Okay?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. Anything else? I
24 guess we've gone through it. All right.

25 MR. GLANZ: No, Your Honor. Thank you.

1 THE COURT: Appreciate y'all's
2 presentations. I'll try to get orders out on this
3 soon. And I will see you on the 14th. Y'all have a
4 good Thanksgiving.

5 MS. KASTRIN: You as well.

6 THE DEFENDANT: Thank you, Your Honor.

7 (The Court stood in recess.)
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